No. 04-70

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This brief is filed on behalf of the Product Liability Advisory Council, Inc. as *amicus curiae* in support of respondents, with the written consent of the parties in this matter as well as the consolidated case, *Ortega v. Star-Kist Foods, Inc.*, No. 04-79.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with over 120 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices.[2] PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of products liability law and that have the potential to affect PLAC's members. PLAC has submitted hundreds of *amicus* briefs in state and federal appellate courts, including this Court. *See, e.g., Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000), which presented the same question posed in this case.

The members of PLAC have a significant interest in the rules governing federal jurisdiction over putative class

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1. Copies of these consents have been filed with the Clerk of the Court. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief addresses the issues presented in this matter and not the *Ortega* case.

2. A list of PLAC's current corporate membership is included as Appendix A to this brief. Although Exxon Mobil Corporation is a member of PLAC, it does not join and has had no role in PLAC's brief.

actions and the removal of such actions to federal courts. In recent years, PLAC members have suffered through an upsurge of state-court class actions. They have gained first-hand experience with varying approaches to class action litigation in state courts, and in particular, with the disparate treatment of class action defendants. They have endured the burdens of hundreds of duplicative class actions in state courts across the country, fenced off from the procedures available in federal court to consolidate those cases in one court. PLAC's experience enables it to offer a valuable perspective on the issues before this Court.

SUMMARY OF ARGUMENT

This Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), rested on non-statutory rules of ancillary and pendent jurisdiction that are no longer valid. Under *Zahn*, a federal court hearing claims against one party generally needed an independent statutory basis to assert jurisdiction over claims against another, even if the new claims were part of the same case and controversy. Congress changed those rules when it enacted 28 U.S.C. § 1367. That statute provided, in plain language, that district courts with original jurisdiction over an action "have supplemental jurisdiction over all other claims" encompassed by the same case or controversy. Lest there be any doubt, Congress made clear that this supplemental jurisdiction included "claims that involve the joinder or intervention of additional parties."

Congress in § 1367 thus displaced the jurisdictional predicates for the formalistic barrier to federal courts erected in *Zahn*. Specifically, by extending supplemental jurisdiction to other claims and other parties, § 1367 jettisoned any requirement that unnamed class members in a class action

under state law allege an injury in excess of the jurisdictional minimum, when the claims of named plaintiffs satisfy the requirements for diversity jurisdiction.

Far from producing an "absurd" result, reading § 1367 to mean what it says in this regard extinguishes a logical inconsistency in the law regarding federal jurisdiction. There is simply no way to reconcile *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) – requiring only the original named plaintiffs to satisfy the diversity of citizenship requirements in 28 U.S.C. § 1332(a) – with *Zahn* – requiring every class member to satisfy the jurisdictional amount threshold set forth in the same sentence of the same subsection.

From the standpoint of judicial administration, enforcing the natural meaning of § 1367 also produces sensible results. For more than a decade, many lower courts have read § 1367 as obviating the need for each class member to satisfy the jurisdictional amount requirement. No floodgates have opened. The limits on diversity jurisdiction have not fallen away. And the federal courts adopting this approach have continued to function as well as their counterparts elsewhere.

Indeed, despite these rulings, out-of-state defendants still face multiple, inconsistent, concurrent class actions in state courts. A few state trial courts have become magnets for large interstate class actions. In fact, one county judge certified 35 classes from 1996 to 1997, compared to 38 for 1997 in the entire federal court system. *See* H.R. Rep. No. 107-370, at 18 (2002). Although many state courts apply class action requirements appropriately and treat foreign defendants fairly, it takes no great feat of imagination to determine why a few county courts garner a radically disproportionate number of

class actions: those courts are not fair forums for out-of-state defendants. The potential for such unfairness is precisely why the Framers established diversity jurisdiction.

In addition, in federal court, class actions asserting the same claims on behalf of overlapping classes may be transferred to one district for coordinated or consolidated proceedings. There is no similar efficient means for adjudicating conflicting and duplicative class actions pending in state courts across the nation.

Courts, commentators, and legislators have increasingly recognized the importance of providing a federal forum to alleviate these problems. That is what § 1367 does. That is what the words of the statute command. That is what Congress intended to accomplish. PLAC urges that the Court allow the provision its natural effect, and spare litigants the burdens imposed by illogical jurisdictional rules.

ARGUMENT

I. The Plain Language Of Section 1367 Authorizes Supplemental Jurisdiction Over The Claims Of All Class Members.

The parties have exhaustively addressed why § 1367 means what it says, or in the view of petitioner, why it does not. PLAC has only a few brief points to add. First, petitioner contends that the statute does not extend to unnamed class members seeking less than $75,000 because a "civil action of which the district courts have *original jurisdiction*" is an essential predicate for supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) (emphasis added); Pet. Brief at 9-10, 21-24. Petitioner contends that "original jurisdiction" in a diversity case is determined by applying 28 U.S.C. § 1332 to all the claims in the complaint.

If the statute confers jurisdiction over all the claims, there is "original jurisdiction." If it covers some but not all the claims, a federal district court does not have "original jurisdiction" in petitioner's view. And without "original jurisdiction," the argument runs, there can be no supplemental jurisdiction. *See* Pet. Brief at 21-24.

In a putative class action, however, the named plaintiffs proceed on behalf of themselves and as "representative parties on behalf of all" class members. Fed. R. Civ. P. 23(a); *see also Hansberry v. Lee*, 311 U.S. 32, 41, 43 (1940) (describing class actions as "representative" suits on behalf of "absent" class members). Unless and until the court certifies a class, the other class members are not parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (stating that, unlike a typical party to a lawsuit, an absent class member is "not required to do anything"); *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) (noting that the petitioner in that case had been unwilling to advance "novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*"). Before certification, they are asserting no claims. *See Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975) (ordering the dismissal of a putative class action as moot, in the absence of a proper certification of a class, because no controversy remained with respect to the named plaintiffs' claims); *see also Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001) (stating that a "class action, when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class under Rule 23."). Before certification, unnamed class members are "rarely" subjected to discovery

and are not bound by court rulings. *Shutts*, 472 U.S. at 810-11.[3] Indeed, before certification, the class members often cannot be identified and have no knowledge of the suit. *Devlin*, 536 U.S. at 10; *Hansberry*, 311 U.S. at 41.

It is particularly inappropriate to treat absent class members as parties before certification where, as here, certification is requested pursuant to Fed. R. Civ. P. 23(b)(3). Under well-settled law, absent class members need not decide whether to bring a separate individual lawsuit, to intervene as a party in the action, or to remain as a member of the putative class *until* there is a certification ruling. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983). As noted, they often do not even know that someone is purporting to litigate claims on their behalf, let alone that they have a right to pursue such claims in a separate lawsuit of their own. That is why, after certification of a Rule 23(b)(3) class, due process *requires* that a court provide each absent class member with an opportunity to opt out of the class. *Shutts*, 472 U.S. at 812; *see also* Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (holding that each class member must be notified of his right to "press his claim separately"). For all these reasons, the appropriate analysis under § 1367 is to determine first whether the court has original jurisdiction over the claims of the named plaintiffs. If so, then upon certification of the class, the court may assert supplemental jurisdiction over the claims of class members.

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3. Lower courts routinely apply this principle. *See, e.g., Chevron USA Inc. v. Sch. Bd. Vermilion Parish*, 294 F.3d 716, 719-20 (5th Cir. 2002); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n.1 (9th Cir. 2000); *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 179-80 (3d Cir. 1994).

This analysis is consistent with the treatment of class members in *Zahn*. The Court did not envision that jurisdiction over the claims of *all* class members would evaporate if the claim of any *one* of them fell below the jurisdictional threshold. Rather, the Court held that the class members with claims below the jurisdictional threshold simply would be excluded from the case. *Zahn*, 414 U.S. at 295 (requiring *only* dismissal of "those litigants whose claims do not satisfy the jurisdictional amount"); *accord In re Sch. Asbestos Litig.*, 921 F.2d 1310, 1315 (3d Cir. 1990). In other words, there was original jurisdiction over the claims of some members. But at that time, the case law did not permit the extension of "pendent party" jurisdiction to the claims of others whose claims otherwise did not fall within any jurisdictional grant.

In addition, petitioner seeks to frame the issue here as whether Congress intended to overrule *Zahn*, triggering a search for evidence of Congressional intent zeroing in on that specific precedent. *See* Pet. Brief at 34-40. That is not the appropriate inquiry. The Court in *Zahn* predicated its opinion on the long-standing rule that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts." 414 U.S. at 294. Indeed, years later in *Finley v. United States*, 490 U.S. 545, 551 (1989), the Court, reiterating that rule, specifically identified as the "most significant element of 'posture' or of 'context'" in *Zahn*, the fact "that the added claims involve added parties over whom no independent basis for jurisdiction exists." *See also id.* at 556 ("All of our cases – *Zahn*, *Aldinger*, and *Kroger* – have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule. . . ."). In § 1367, Congress

unequivocally changed that rule, displacing the central predicate for the *Zahn* decision. Under the current statutory scheme, as this Court has stated, the "whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997); *see also* H.R. Rep. No. 101-374, 1990 U.S.C.C.A.N. 6860, 6874 (1990) (suggesting that Congress intended the federal courts to be "a practical arena for the resolution of an entire controversy").

The issue for this Court, then, is not whether Congress, in lifting the prohibition against pendent party jurisdiction, formulated a specific intent to overrule *Zahn* or other particular Supreme Court decisions predicated on that bar.[4] Rather, the question is whether this Court, under the changed circumstances, applying the new jurisdictional rule that Congress codified, should reach the same result as in *Zahn*. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587-89 (1993); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238, 241-42 (1970). Given the plain language of the statute, it should not.

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4. That said, several leading treatises have concluded that Congress did overrule *Zahn*. *See*, *e.g.*, 5 James William Moore *et al.*, *Moore's Federal Practice* § 23.63[2][c], at 23-302 to 23-303 (3d ed. 2004) ("The better view is that *Zahn* was overruled by the passage of the supplemental jurisdiction statute."); 13 C. Wright, A. Miller, E. Cooper and R. Freer, *Federal Practice and Procedure* § 3523.1, at 181 (2004 Supp.) ("Section 1367 seems clearly to overturn the result of that case [*Zahn*]."); 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 6.11, at 598 (4th ed. West 2002) (The Act's "overruling of *Zahn* is fully consistent with the reasoning of the Federal Courts Study Committee on whose recommendation the Act was adopted.").

II. Interpreting Section 1367 To Allow Supplemental Jurisdiction Over All Class Members Yields Sensible Results.

Petitioner contends that the "absurd results" flowing from Eleventh Circuit's interpretation of § 1367 "militate strongly" against its adoption, *see* Pet. Brief at 29-30. The argument is contrary to the conclusion of many legal scholars that *Zahn* itself produced absurd results. The requirement in *Zahn* that each class member satisfy the jurisdictional amount requirement is logically incompatible with the holding of *Ben-Hur* that the citizenship of unnamed class members need not be considered in determining diversity jurisdiction.[5] The jurisdictional amount and the diversity of citizenship requirements appear in the same sentence of the same subsection of § 1332. Nothing in the wording of the statute warrants treating them differently. The anomaly created by *Zahn* in doing so anyway undercuts the suggestion that retiring that decision yields absurd results.

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5. *See*, *e.g.*, Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 60-61 (Winter 2004) (stating that the holdings of *Zahn* and *Ben-Hur* "cannot be reconciled"); Thomas D. Rowe, *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63-64 (Winter 1998) (contrasting the holdings of *Ben-Hur* and *Zahn* and concluding that overruling *Zahn* would produce a more "coherent and workable" jurisdictional scheme); James M. Underwood, *Supplemental Serendipity: Congress' Accidental Improvement of Supplemental Jurisdiction*, 37 Akron L. Rev. 653, 678 (2004) (criticizing *Zahn* for creating this "anomaly" with respect to diversity class actions); Mark C. Cawley, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation*, 73 Notre Dame L. Rev. 1045, 1053-54 (May 1998) (finding "no justification for relaxing the burdens of diversity in *Ben-Hur* while adhering so rigidly to them in *Zahn*").

In any event, as this Court has held again and again, the plain language of the statute controls.[6] Arguments that Congress could not have intended what it clearly said have found little favor. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459-61 (2002) (emphasizing that the Court's "role is to interpret the language of the statute enacted by Congress"); *see also Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (reversing a lower court's determination that a plain reading of a statute would lead to "absurd results" where Congress's policy choices were "reasonable" on their face). If there is any room for the notion that "absurd results" justify abandoning the plain meaning of a statute, the test must be more than a façade for an alternative policy preference. *Barnhart*, 534 U.S. at 461-62 (refusing to "alter the text in order to satisfy the policy preferences" of the adversely affected party); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 13-14 (2000) (reaffirming that the Court does not "sit to assess the relative merits of different approaches" to legislation); *see also Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) ("It is not our place to balance" the "competing policies" at work in § 1367). In arguing that it was *unwise* for Congress to expand federal jurisdiction, petitioner seeks to substitute its judgment for that of Congress.

Furthermore, to argue that extending supplemental jurisdiction over all class members yields absurd results is to suggest an implausible disregard of their function by the federal appellate courts that approved pendent party jurisdiction under analogous circumstances before *Zahn*.

6. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 1030 (2004); *BedRoc Ltd. v. United States*, 541 U.S. 176, 124 S. Ct. 1587, 1593 (2004); *United States v. Ron Pair Enters. Inc*, 489 U.S. 235, 241 (1989).

See, e.g., Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 816-17 (8th Cir. 1969) (Blackmun, J.); *Stone v. Stone*, 405 F.2d 94, 97-98 (4th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149, 153-54 (3d Cir. 1968). It suggests a similar analytical deficit by the Federal Courts Study subcommittee. Its report, authored by subcommittee chairman Judge Richard A. Posner before enactment of § 1367, proposed *rejecting Zahn*. *See* Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States (Mar. 12, 1990), *reprinted in* 1 Federal Courts Study Committee, *Working Papers and Subcommittee Reports*, 1, 561 n.33 (1990) (noting that the subcommittee's proposal "would overrule" *Zahn* because the *Zahn* decision "makes little sense" from a policy standpoint).[7]

In fact, as the conclusions of these and other respected authorities indicate, § 1367 logically embodies several

7. Moreover, in connection with its Federal Judicial Code Revision Project, the American Law Institute ("ALI") drafted and approved a proposed revision to § 1367. As explained by the project reporter, Professor John B. Oakley, the ALI's proposal would have accomplished "expressly what some courts have deemed to be the inadvertent result of present § 1367(b), literally construed: supplemental jurisdiction extends to claims by or against unnamed class members for less than the amount in controversy required by § 1332, countermanding the rule" of *Zahn*. John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 Ind. L.J. 25, 44 (Winter 1998); *see also Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 549 n.2 (2002) (citing another article publishing ALI's proposal and noting that Professor Oakley's work was "well-reasoned") (Ginsburg, J.). Apparently, ALI, too, did not find that to be an absurd result.

coherent and reasonable policy choices by Congress. *See supra* n.4 & n.5. First, it is more than plausible that Congress desired a "single class action, even one in diversity, to be resolved in a single judicial setting." *Rosmer*, 263 F.3d at 121. Having class actions resolved in one forum could potentially "improve judicial efficiency and cut the cost of litigation." *Id.* at 118-19; *see also Newberg on Class Actions*, *supra* n.4, at 598 (recognizing that Congress had good reasons to overrule the result in *Zahn*: "[a]chievement of judicial economy with the avoidance of multiplicity of actions is a major objective of class actions."). The promise of improved efficiency swayed Justices Brennan, Douglas, and Marshall in *Zahn*, *see* 414 U.S. at 308 ("It should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims.") (Brennan, J., dissenting). Courts and commentators have recognized this goal as an important object of the legislation on supplemental jurisdiction. *See In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (abolishing the "strictures of *Zahn* is not an absurd result; it would be welcomed by "respected commentators"), *aff'd by an equally divided court*, 529 U.S. 333 (2000) (per curiam); *see also generally Ponce Fed. Bank, F.S.B. v. Vessel "Lady Abby"*, 980 F.2d 56, 58-59 (1st Cir. 1992) (Breyer, C.J.) (allowing a district court to assert pendent party jurisdiction over a non-diverse defendant in a admiralty case seems "eminently fair" and would help "conserve judicial resources").

Further, Congress may have "imputed a bias in state court against certain out-of-state defendants which it sought to counteract by fortifying diversity jurisdiction." *See Rosmer*, 263 F.3d at 121. *See also* Freer, *supra* n.5, 53 Emory L.J. at 64 (characterizing *Zahn* as an "antidiversity decision" but

noting that the "overwhelming consensus, even among some leading figures who would abolish diversity jurisdiction, is that *Zahn* should go"); Cawley, *supra* n.5, 73 Notre Dame L. Rev. at 1076 (applauding Congress's "desire to reduce court congestion and improve access to federal jurisdiction" by passing § 1367). Whether Congress was right or wrong in that conclusion – and PLAC submits that there was and is a substantial basis for it – it is a reasonable, not absurd, determination of policy.

Recent experience has more than validated the policy choices reflected in the supplemental jurisdiction statute. Congress has accumulated substantial evidence in the past six years documenting numerous problems with the current class action system which threaten the rights of both plaintiffs and defendants. *See, e.g.*, S. Rep. No. 108-123, at 2, 5-6 (2003) (summarizing the history of recent Senate hearings regarding class action reform); H.R. Rep. No. 108-144, at 7-8 (2003) (concluding, after a series of House Judiciary Committee hearings over the years, that there are "pervasive" abuses in state courts). In June 2003, the House of Representatives responded to these deficiencies by passing legislation expanding the right to remove class actions to federal court.[8] Recognizing that interstate class actions "deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit,"[9]

8. H.R. 1115, 108th Cong. (2003). *See also* 149 Cong. Rec. H5307 (daily ed. June 12, 2003) (passing by vote of 253-170). The United States Department of Justice and President Bush supported the legislation. *See Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the House Comm. on the Judiciary* 108th Cong. 6-7 (2003) (testimony of Viet Dinh, Assistant Attorney General at that time).

9. H.R. Rep. No. 108-144, at 6-7 (2003).

the legislation allowed federal jurisdiction over certain putative class actions so long as there is minimal diversity among the parties (including the unnamed class members). Jurisdiction lay regardless of each claimant's amount in controversy.[10]

Despite recent efforts at reform, the well-documented and long-standing problems in state court class actions persist. *See* Lisa Litwiller, *Why Amendments to Rule 23 are not Enough: A Case for Federalization of Class Actions*, 7 Chap. L. Rev. 201, 201-02 (Spring 2004) (stating that class action adjudications in state courts frequently contravene "basic fairness"); Martha Neil, *New Route for Class Actions*, 89-JUL ABAJ 48, 49 (July 2003) (noting the "widespread view" that the class action system is "badly broken and in sore need of fixing"). More than ever, expanded federal jurisdiction over class actions is needed to stop the "parade of abuses" facilitated by current diversity and removal standards. *See* S. Rep. No. 108-123, at 7; *see also* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case out Of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 149-50 (Fall 2001) (discussing the "growing recognition" that federal court management of class actions is desirable).

First, some state courts have become magnets for class actions, effectively declaring themselves the national tribunals for such cases. A report by the RAND Institute for

10. The Senate Judiciary Committee favorably reported a comparable bill, *see* S. 274, 108th Cong. (2003), and a vote in the Senate may occur in the next legislative session. The actions of the House of Representatives and the Senate Judiciary Committee suggest that even if § 1367 had abolished the requirement of complete diversity, that would not be quite so "absurd" a result as petitioner claims.

Civil Justice ("RAND/ICJ") confirmed that these courts have attracted so many cases because they are more likely to certify nationwide classes than are other courts, federal or state. Exec. Summary, RAND/ICJ, *Class Action Dilemmas* 7 (1999); *see also* H.R. Rep. No. 107-370, at 17-18 (2002) (describing these disproportionate state court filings as a "race to the bottom"). For example, one state court judge certified almost as many classes during 1996-1997 as were certified during 1997 by all approximately 900 sitting federal district judges. *Id.* Since 1997, the flood of litigation filed in state courts known for a "lax" attitude toward class certification has continued. *See* H.R. Rep. No. 108-144, at 8, 11 (discussing the "mushrooming" numbers of cases filed in state courts); S. Rep. No. 108-123, at 14-23 (noting the "dramatic explosion" of class litigation in state courts and documenting numerous abuses).[11]

11. Madison County, Illinois often is identified as one of the "magnets" or "hotbeds" of class action activity in the state courts. Although it is home to less than one percent of the U.S. population, plaintiffs' lawyers filed over 100 new class actions in Madison County in 2003. *See* Brian Bruggemann, *Class-Action Lawsuits Set a Record*, Belleville News-Democrat (Jan. 2, 2004), *available at* 2004 WL 56695988. To put this in context, the class actions filed in Madison County *alone* equaled 40% of the total number of new diversity class actions filed in the *entire* federal system in 2003. *See infra* n.17. And almost all of those cases remain in the Madison County court, even though the Seventh Circuit does not follow *Zahn*, because plaintiffs' lawyers devise ways to block removal to federal court. *See* S. Rep. No. 108-123, at 11-12 (discussing how class lawyers use current jurisdictional rules to "game the system"). Indeed, President Bush recently traveled to Madison County and emphasized the need to address the ongoing class action problem there and in other state courts. George W. Bush, Address at the Gateway Center (Jan. 5, 2005), *available at www.whitehouse.gov/news/releases/2005/01/20050105-4.html* (last visited Jan. 6, 2005) (stating, *inter alia*, that federal court is the "proper place" for interstate class actions to be heard).

The Department of Justice likewise has recognized that certain state courts are much less likely than federal courts to afford defendants fair treatment. As then Assistant Attorney General Viet Dinh testified in May 2003, certain state and local courthouses have become "notorious for the ease with which they certify" class actions. *See Class Action Fairness Hearing*, *supra* n.8, at 6.

This abuse of class action litigation has inflicted serious burdens on defendants (including many of PLAC's corporate members), as well as on consumers.[12] Certification of a class alters the litigation, dramatically increasing the risks to the defendant and, consequently, escalating the incentives for settling even the most groundless actions. *Id.*; *see also Class Action Fairness Hearing*, *supra* n.8, at 6-7 (expressing the government's view in 2003 that these state court practices may unfairly "coerce" defendants to settle class litigation).[13]

12. *See, e.g., Class Action Jurisdiction Act of 1998, Hearing Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary on H.R. 3789* 105th Cong. 22-23 (1998) (attached March 5, 1998 testimony of John W. Martin, Jr. discussing the proliferation of class action litigation against the Ford Motor Company and others).

13. As one witness put it, "hundreds of frivolous lawsuits" are filed in favorable state courts and used as "high-stakes, court-endorsed blackmail devices" against companies. *See Mass Torts and Class Actions: Hearing before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary* 105th Cong. (1998) (statement of Dr. John Hendricks); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (noting that a class certification order "often, perhaps typically, inflict[s] irreparable injury on the defendants").

Second, Congress has identified as another class action abuse, the filing of "copy cat" or duplicative class actions asserting similar claims on behalf of essentially the same people in different jurisdictions. *See* H.R. Rep. No. 108-144, at 15 (stating this practice was "far too prevalent" in state courts).[14] These "copy cat" actions often represent "blatant forum shopping" for a receptive judge who will quickly certify a class, but it is also common for enterprising class lawyers to file duplicative complaints in an effort to wrest control of class litigation from other lawyers who initiated it (thereby garnering a larger share of legal fees). S. Rep. 108-123, at 21. Because there is no mechanism for consolidating competing lawsuits filed in different states, litigants caught in the crossfire suffer staggering, yet unnecessary costs and burdens. *Id.* (noting that settlements of these overlapping actions often favor the class lawyers more than the putative class members).

Federal courts, in contrast, can manage "copy cat" class actions by transferring duplicative suits to a single court, *see* 28 U.S.C. § 1407 (providing for consolidation by the Judicial Panel on Multidistrict Litigation). Both the Senate and House Judiciary Committees therefore have concluded that allowing greater access to federal courts would help

14. For example, over 100 class actions were instituted against Wyeth following its withdrawal of certain diet medications from the market in 1997. *See In re Diet Drugs Phentermine, Fenfluramine, Dexfenfluramine Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000). Similarly, at least 105 class actions involving the diabetes drug Rezulin and over 100 involving automobile tires have been filed in recent years. *See* Lisa Girion *et al.*, *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1, *available at* 2001 WL 28938628; *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106.

prevent this type of wasteful tactical maneuvering and foster consistency in the treatment of class actions. S. Rep. No. 108-123, at 21; H.R. Rep. No. 108-144, at 15.

Third, review of the many class actions filed in state courts rebuts the "false federalism" concerns typically raised when Congress has considered expanding federal jurisdiction in this area. It does not promote federalism for one state to override the laws of another, yet that happens frequently in class action litigation. As former Solicitor General Walter E. Dellinger, III warned the House Judiciary Committee several years ago,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[15]

This type of interference by state courts with the laws of other jurisdictions has affected banks, manufacturers, insurance companies, and many other American businesses. S. Rep. No. 108-123, at 24; H.R. Rep. No. 108-144, at 14. The Commissioner of the District of Columbia Department of Insurance and Securities made clear the need to curb this judicial imperialism: "Large-scale nationwide litigation against major insurance companies frequently circumvents

15. *Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* 106th Cong. (1999) (statement of Hon. Walter E. Dellinger, III).

or simply ignores state insurance laws and the role of state regulators." *See Class Action Fairness Hearing, supra* n.8, at 12 (prepared statement of Lawrence H. Mirel). A class action system that allows one state court judge to dictate national policy on these and other important issues to forty-nine other states, offends basic principles of federalism.

Finally, many witnesses at recent congressional hearings have expressed concern that barring the doors of federal courts to most class actions exacerbates these problems. *See* S. Rep. No. 108-123, at 15 (noting that the "lack of a federal forum" for most class actions has led to the inconsistent administration of class actions in state courts); H.R. Rep. No. 107-370, at 14 ("Because the alternative Federal forum is not available, considerable class action abuse is occurring in many States courts."). As class action abuses have mounted, the resulting record discloses that "the public, the media, and experts" agree that reform is needed, and that "current practices are far from what the Framers envisioned." S. Rep. No. 108-123, at 26. Indeed, most class actions are precisely the type of cases that belong in federal court, especially considering the high stakes involved, the potential for local bias against out-of-state defendants, and the need to respect the policy choices of various states in large, multi-state class actions.

Echoing that view, the United States Court of Appeals for the Eleventh Circuit apologized to a defendant for remanding a large class action to an Alabama state court, noting that the state court "has on occasion produced gigantic awards against out-of-state corporate defendants." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999). As the court observed, "[o]ne would think that this case is exactly what those who espouse the historical

justification for [federal diversity jurisdiction] would have had in mind," *id.*, but the current federal jurisdiction rules do not "adequately accommodate the reality of modern class action litigation," *id.* at 799 (Nangle, D.J., concurring).[16]

In sum, as the United States suggests in its *amicus* brief in the consolidated case, interpreting § 1367 in accordance with its clear language furthers at least two Congressional purposes: (1) promoting the "efficient resolution of disputes, both for parties and for the federal and state court systems"; and (2) providing a "neutral federal forum for the adjudication of substantial controversies involving diverse parties." *See* 2004 WL 2831810, at *26-28. Those purposes are even more important now than when the statute was enacted. Accordingly, this is *not* a situation in which absurd results could conceivably justify discarding the plain meaning of the statute. *Barnhart*, 534 U.S. at 459-61; *Rucker*, 535 U.S. at 134. To the contrary, the straightforward reading of the statute produces the right result, as a matter of law and as a matter of policy.

III. Section 1367 Has Not Caused A Flood Of Diversity Class Actions In The Federal Courts.

Some have suggested that the natural reading of the supplemental jurisdiction statute will deluge the federal courts with class action lawsuits. *See, e.g., Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 773 (11th Cir. 2004)

16. Similarly, in *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (Scirica, J.), the Third Circuit observed that "national (interstate) class actions are the paradigm for federal diversity jurisdiction," yet most such "class actions may be beyond the reach of the federal courts" under the current jurisdictional statutes.

(expressing concern about "open[ing] the doors" of the federal courthouse to "miniscule" claims) (Tjoflat, J., dissenting). Even if these institutional concerns could trump the plain language of the statute, they are not well founded. Section 1367 has been on the books for fourteen years. The first federal appellate court to read it as dispensing with the limits articulated in *Zahn* did so ten years ago. As of today, five other courts of appeal have agreed. Court statistics thus permit empirical verification of the dire predictions. In fact, they have not come true. The flood (or at least one that can be attributed to § 1367) has not happened.

Since 1990, the number of diversity cases by private litigants has not increased dramatically. Compared to 1990, the number of diversity cases brought in federal court has been *lower* in eleven (11) out of the thirteen (13) years during which the supplemental jurisdiction statute has been in effect. *See* Administrative Office of The United States Courts, *Judicial Facts and Figures*, Table 2.1, *available at www.uscourts.gov/judicialfactsfigures/table2.01.pdf* (last visited January 6, 2005). By contrast, the number of federal question cases filed in the federal courts by private parties has been *higher* in *each* of the past thirteen years than the number of such cases filed in 1990. *See id.* Thus, diversity cases today represent a *smaller* percentage of the overall federal docket than they did in 1990. *Id.*

In addition, there is no evidence that rulings by the lower courts extending supplemental jurisdiction in class actions have engendered disproportionate numbers of diversity class actions in those particular Circuits. *See* Underwood, *supra* n.5, 37 Akron L. Rev. at 707 (stating that "there have been no reports of mass filings" in the districts within the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits); Rowe, *supra*

n.5, 74 Ind. L.J. at 64 (noting that despite court rulings exercising supplemental jurisdiction over below-limit claims, the "Republic has not tottered").[17]

The evidence that § 1367 has not inundated the federal court system with diversity cases accords with a realistic appraisal of the jurisdictional statutes. In the real world of class action litigation, § 1367 does not provide parties automatic admission to the federal courts. Thus, for example, several courts of appeal, while adopting the interpretation urged by respondents and PLAC here, nevertheless concluded for other reasons that federal jurisdiction was lacking in the case before them. *See, e.g., Gibson v. Chrysler Corp.*, 261 F.3d 927, 934, 940-43 (9th Cir. 2001) (holding that § 1367 overruled *Zahn*, but finding no federal jurisdiction in that action because the named plaintiffs failed to satisfy the amount in controversy requirement); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607-08 (7th Cir. 1997) (same). Further, Committees in both the United States Senate and House of Representatives recently have observed that, despite the holdings of most circuits extending supplemental jurisdiction over all class members' actions, relatively few diversity class actions "find their way into Federal court because plaintiffs offer named plaintiffs who do not have $75,000 claims or name a non-diverse plaintiff or defendant in order to prevent removal of the case to federal court." S. Rep. No. 108-123, at 12 n.32; H.R. Rep. No. 108-144, at 20 n.68.

17. The total number of new class actions brought in 2003 based on diversity jurisdiction (266) is either lower than or in line with previous years. *See* Administrative Office Of The United States Courts, *Judicial Business of the United States Courts 2003*, Table X-5, *available at www.uscourts.gov/judbus2003/appendices/x5.pdf* (last visited January 6, 2005).

If this Court rules, for all the Circuits, that § 1367 obviates the need for all class members to meet the jurisdictional amount threshold, presumably some additional class actions will proceed in federal court. But, if so, many would overlap and be consolidated with federal matters already pending. Because of the consolidation procedures in federal court, multiplicity of class actions is not the problem it is in the state courts. These cases generally end up being treated as one case in one court.

More importantly, a decade of experience simply provides no basis for alarm. Enforcing the plain meaning of the statute will not overload the federal judiciary. Section 1367 has not swung the gates to federal court wide open. Meaningful limits on federal jurisdiction over class actions have remained, and will remain after the decision in this case. *See also Jinks v. Richland County*, 538 U.S. 456, 459 (2003) (emphasizing that supplemental jurisdiction is discretionary and that federal courts need not (and will not) decide "every claim" satisfying the requirements of the statute).

CONCLUSION

For the foregoing reasons, the Court should affirm the Eleventh Circuit's ruling that there is federal jurisdiction over this case.

Respectfully submitted,

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APPENDIX — PRODUCT LIABILITY ADVISORY COUNCIL, INC. LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.

Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
Delphi Corporation
Diageo North America Inc.
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.

International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
The Procter & Gamble Company
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation

Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.